Supreme Court, U.S.
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92-1908

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

WALLACE L. REDLIN,

Petitioner

Versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Arthur M. Hopper
Austin, Hinderaker, Hopper & Strait
25 First Avenue S.W., P.O. Box 966
Watertown, S.D. 57201-0966
(605) 886-5823
ATTORNEYS FOR PETITIONER

Michelle G. Tapken
Assistant United State's Attorney
135 Federal Bldg. & U.S. Courthouse
400 South Phillips Avenue
Sioux Falls, South Dakota 57101
(605) 330-4400
ATTORNEYS FOR RESPONDENT

86 pp

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in affirming the District Court's failure to subtract sums paid to the government by the Defendant, prior to sentencing, in calculating the "loss" to the government under the Federal Sentencing Guidelines, when no actual loss was intended.

2. Whether the Court of Appeals erred in holding that Defendant's failure to specifically object to the method of calculating the loss under the Federal Sentencing Guidelines at sentencing when an objection was made to the amount of the loss stated in the presentence report, constitutes a waiver of the argument.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Eighth Circuit are those listed in the caption.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
BASIS FOR JURISDICTION	2
CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT OF CERTIORARI	13
I. THIS CASE PRESENTS AN IMPORTANT QUESTION PERTAINING TO THE PROPER METHOD OF DETERMINING THE AMOUNT OF "LOSS" UNDER THE FEDERAL SENTENCING GUIDELINES	13
II. THE COURT OF APPEALS DECISION HOLDING THAT THE DEFENDANT WAIVED HIS ARGUMENT BECAUSE HIS OBJECTION WAS NOT SUFFICIENTLY SPECIFIC WAS IN ERROR	33
III. CONCLUSION	37

APPENDICES

A.	Appendix A Decision of Court of Appeals	App. 1
B.	Appendix B Decision of District Court	App. 18
C.	Appendix C Court of Appeals Denial of Rehearing	App. 34
D.	Appendix D Court of Appeals Denial of Motion for Stay of Mandate	App. 35
E.	Appendix E United States Supreme Court Clerk Letter Denying Motion for Stay of Mandate	App. 36
F.	Appendix F Statutes and Federal Sentencing Guidelines	App. 38

TABLE OF AUTHORITIES

	Page
UNITED STATES SUPREME COURT CASES	
United States v. Cockerham 919 F.2d 286 (5th Cir. 1990)	34
United States v. Davis 922 F.2d 1385 (9th Cir. 1991)	20-21
United States v. Frye 831 F.2d 664 (6th Cir. 1987)	34
United States v. Hughes 755 F.Supp. 348 (E.D. Cal. 1991)	23-25
United States v. Kopp 951 F.2d 521 (3rd Cir. 1991)	14,24-25 26,28,30
United States v. Schneider 930 F.2d 555 (7th Cir. 1991)	14,17-20 22-27
United States v. Smith 951 F.2d 1164 (10th Cir. 1991)	25-28
United States v. Whitehead 912 F.2d 448 (10th Cir. 1990)	27

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

1.	15 U.S.C. §714m(c)	7,13
2.	18 U.S.C. §3742	10
3.	28 U.S.C. §1254(1)	2
4.	28 U.S.C. §2106	30
5.	U.S.S.G. §1B1.3	11
6.	U.S.S.G. §2B1.1	11
7.	U.S.S.G. §2B1.1(b)(1)(I)	9
8.	U.S.S.G. §2F1.1(b)(1)(k)	24
9.	U.S.S.G. §3E1.1	35
10.	U.S.S.G. §3E1.1(c)	35,36
11.	U.S.S.G. §5C1.1	35

Petitioner herein respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this action on January 14, 1993.

OPINIONS BELOW

The judgment and sentence of the district court was pronounced on May 4, 1992 (Appendix B, pp 18). U.S. Court of Appeals for the Eighth Circuit affirmed on January 14, 1993 (Appendix A pp 1). The Eighth Circuit denied Petitioner's petition for rehearing on February 10, 1993 (Appendix C, pp 34). The Eighth Circuit denied Petitioner's motion for stay of mandate on February 24, 1993 (Appendix D, pp 35). The United States Supreme Court denied Petitioner's motion for stay of mandate on March 8, 1993 (Appendix E, pp 36).

BASIS FOR JURISDICTION

The final judgment of the court of appeals was entered on January 14, 1993. On February 10, 1993, the court of appeals denied Petitioner's petition for rehearing (Appendix C, pp 34). This court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

1.	15 U.S.C. §714m(c)	App. 38
2.	18 U.S.C. §3742	App. 38
3.	28 U.S.C. §1254(1)	App. 38-39
4.	28 U.S.C. §2106	App. 39
5.	U.S.S.G. §1B1.3	App. 39-40
6.	U.S.S.G. §2B1.1	App. 40-41
7.	U.S.S.G. §2B1.1(b)(1)(I)	App. 40-41
8.	U.S.S.G. §3E1.1	App. 41
9.	U.S.S.G. §3E1.1(c)	App. 41
10.	U.S.S.G. §5C1.1	App. 42-43

SECONDARY AUTHORITIES

United States Sentencing Guidelines as cited herein, and as quoted in Appendix pp 38-42.

STATEMENT OF THE CASE

Petitioner is a farmer farming in northeastern South Dakota. In the mid 1980's, Petitioner obtained a significant number of farm stored loans from the Commodity Credit Corporation (hereinafter referred to as "CCC") through the Agricultural Stabilization and Conservation Service (hereinafter referred to as "ASCS"). Petitioner had in excess of 40 different loans, secured by pledges of his grain as collateral, including wheat and barley.

In the late 1980's, Petitioner repaid the vast majority of these loans. At about that time, Petitioner rented bins from the South Shore, South Dakota Elevator and stored grain in the bins. The grain was security for government loans. The South Shore Elevator had financial problems. As Petitioner

conducted further investigations, he learned that he "wound up with 12,000 bushels less grain than what [he] had hauled into the elevator." (Sentencing Transcript p. 30). Petitioner's father was a partner in the South Shore Elevator, although he did not work there. Rather than go the ASCS office and explain the loss of the grain at the elevator, Petitioner admittedly made the wrong decision, and used other government grain to cover the government grain that was missing. Petitioner testified at sentencing that "I did a poor job of managing it, and, you know, the end result was I wound up with some bins with no grain ..." (Sentencing Transcript p. 31).

In the spring of 1990, Petitioner had three barley and two wheat reserve loans outstanding which he had not forfeited nor delivered to the CCC as requested. During

the week of March 30, 1990, Petitioner delivered approximately 17,000 bushels of barley with a value in excess of $30,000.00 to the South Shore Elevator. On March 30, 1990, one day after the last delivery of barley, but prior to receiving payment from the elevator, government officials inspected Petitioner's premises. The inspection revealed that all of the barley was gone, and only a small amount of wheat remained.

Petitioner received a $30,000.00 check from the South Shore Elevator dated March 31, 1990. Petitioner paid $25,000.00 to the CCC/ASCS on April 4, 1990, $10,000.00 on April 11, 1990 and $20,000.00 on April 20, 1990 for a total payment of $55,000.00 to the CCC/ASCS within twenty days of receipt of payment for the grain from the South Shore Elevator.

On August 1, 1991, a federal grand jury handed down an indictment in the United States District Court for the District of South Dakota, charging Petitioner with four counts of conversion of mortgaged property, in violation of 15 U.S.C. §714m(c). Pursuant to a plea agreement, Petitioner entered a plea of guilty to counts II and IV on November 20, 1991 with the remaining counts I and III dismissed. A presentence investigation report was ordered by the Honorable Richard H. Battey, presiding judge. Prior to the sentencing on May 4, 1992, Petitioner filed written objections to the portion of the report which calculated the "loss" to the government.

The objection that was filed referred to the fact that the Petitioner repaid $55,000.00 to the CCC/ASCS within 20 days of his receipt of payment for the grain

from the elevator, and the fact that all of the loans had been repaid, with interest and penalties, prior to sentencing. At the time of sentencing, the Petitioner did not owe the Federal Government any money.

Following a hearing on Petitioner's objections, the District Court found that the loss exceeded $70,000.00, attributed eight points to the loss under the Federal Sentencing Guidelines, and held that the sentencing range was six to twelve months in prison. Petitioner was sentenced to serve six months in prison, to pay a $2,000.00 fine and given two years of supervised release following service of the sentence.

Petitioner testified at the sentencing hearing that although he handled it improperly, his intent was to have paid off the loans as far back as

April 4, 1990. When asked about his intention when he took $25,000.00 to the ASCS office on that date, he responded that "basically I would have been able to clear up most of the loans completely" through the purchase of PIK Certificates and buying back the grain with those certificates. (Sentencing Transcript p. 10)

Despite Petitioner's testimony and objection, and the full payment of all sums due the government, the District Court determined that the "loss" to the Federal Government was between $70,000 and $120,000, representing the entire value of all grain missing on the date of the inspection. The court made the determination pursuant to U.S.S.G. §2B1.1(b)(1)(I). The court determined that the basic offense level in accordance with the Federal Sentencing Guidelines was

four points and that eight points should be added for the adjustment given the value of the loss. Petitioner was given a two point downward adjustment for acceptance of responsibility leaving a total offense level of ten. The court added that the Defendant had no criminal convictions, leaving him with zero criminal history points, entitling him to be treated under category one of the Federal Sentencing Guidelines.

On June 11, 1992, Petitioner filed his Notice of Appeal with the District Court. The District Court granted the Petitioner's request for a 30 day extension of time to file the Notice of Appeal on June 12, 1992 and the Notice of Appeal was filed in a timely manner. The United States Court of Appeals for the Eighth Circuit exercised jurisdiction pursuant to 18 U.S.C. §3742. The Eighth

Circuit affirmed. Despite the Petitioner's objection to the amount of the loss in the presentence report, the Eighth Circuit held that Petitioner's failure to specifically bring to the attention of the District Court an alternative method for calculating the loss constituted a waiver of the argument and prevented its review of that claim.

The Eighth Circuit further stated that the District Court correctly accepted U.S.S.G. §2B1.1 as a proper standard for the calculation of loss, and concluded that the amounts from the dismissed charges were properly included in the loss of calculation as related conduct under U.S.S.G. §1B1.3.

Petitioner filed a petition for rehearing on January 26, 1993. On February 10, 1993 the Eighth Circuit Court of

Appeals denied Petitioner's petition for rehearing.

On February 10, 1993 the Eighth Circuit Court of Appeals denied Petitioner's motion for stay of mandate. The United States Supreme Court denied Petitioner's motion for stay of mandate on March 8, 1993.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. THIS CASE PRESENTS AN IMPORTANT QUESTION PERTAINING TO THE PROPER METHOD OF DETERMINING THE AMOUNT OF "LOSS" UNDER THE FEDERAL SENTENCING GUIDELINES.

This case presents the important question of whether an individual having no intent to permanently deprive the government of the proceeds of mortgaged grain, and who fully re-paid all loans incidental thereto, should be sentenced, based upon a "loss" that includes the amounts repaid, when no loss resulted or was intended. Petitioner pled guilty to two counts of violating 15 U.S.C. 714m(c) in that he did conceal, remove, dispose of, or convert to his own use property mortgaged or pledged to the CCC. Appendix A--Statutory Index, Federal Sentencing Guidelines Manual indicates that the sentence for this offense is to be made

pursuant to U.S.S.G. §2B1.1. That section relates to larceny, embezzlement and other forms of theft. Petitioner's intent and his conduct, however, are more akin to the offense of fraud. The distinction between fraud and theft was described by the United States Court of Appeals for the Third Circuit in United States v. Kopp, 951 F.2d 521, 529 (3rd Cir. 1991):

> "Furthermore, all thefts involve an intent to deprive the victim of the value of the property taken. As the Seventh Circuit has noted, the same is not always true for fraud: some fraud involves an intent to walk away with the full amount fraudulently obtained, while other fraud is committed to obtain a contract the fraud perpetrator intends to perform." (Citing United States v. Schneider, 930 F.2d 555 (7th Cir. 1991).)

In this case, Petitioner pled guilty to the act of conversion of mortgaged property. Unlike the theft cases, or the first type of fraud case described by the

Kopp court, Petitioner did not intend to walk away with the grain so that the government would not be paid. Instead, his intent was to try to cover mortgaged grain that had been removed or was missing from the South Shore Elevator. He was trying to cover that grain so that the government and his other creditors would get paid, and his father would not suffer the public embarrassment, and perhaps financial loss, that would result from the disappearance of grain at the South Shore Elevator. As Redlin stated at sentencing, he was using other government grain to cover the shortages, and did a poor job of managing it with the result that the last loans remained unpaid and the grain was gone. His last attempt to pay the loans and make the government whole was shortly after delivery of the barley in March, 1990. He intended to purchase PIK

certificates and buy the grain back with those certificates. He thought he would then be able to clear up most of the loans completely. He was told by the ASCS manager, however, that he could not purchase the PIK certificates. He was then "in a real bind right at that time because I had to use the actual--the actual dollars that I had gotten from the elevator to repay the ASCS office, and I also had a financial problem at the bank where they wanted so much money down on my loan, and I was trying to satisfy both parties at the same time". (Sentencing Transcript p. 11). (Emphasis added). "It just changed the matter of how I was going to deal with repaying these loans." (Sentencing Transcript p. 21).

As indicated, these facts do not describe a common theft of property. They are much more consistent with the second

type of fraud described by the Kopp court. Just as a perpetrator may misrepresent facts to obtain a contract that he fully intends to perform, Petitioner committed an act of conversion, hoping to manage his affairs so he could perform his obligations and pay the loans. He was not successful, as loans remained unpaid after the grain was gone. He was not able to carry out his plan to purchase the PIK certificates and buy back the grain, yet he was eventually able to pay his debt to the government completely.

Petitioner urges that the penalty should be represented by the number of points assigned to the commission of the offense itself, and not additional points where there was no actual loss to the government, and no loss was intended.

The United States Court of Appeals for the Seventh Circuit in United States

v. Schneider, 930 F.2d 555 (7th Cir. 1991), determined that the calculation of loss in fraud cases requires the court to distinguish between the different types of fraud involved, according to the conduct and intent of the defendant.

In Schneider, the defendants, husband and wife, were sentenced to 30 and 15 months in prison, respectively, for conspiring to defraud, and defrauding, two federal agencies, in violation of various federal statutes. Mr. Schneider, an experienced building contractor, submitted a bid for $65,900.00 on a contract, and in the papers accompanying the bid, he falsely certified that he had not been charged with a criminal offense within the past three years. Id. at 556. He also submitted a fraudulent payment and performance bond. Eventually he was the low bidder and won the contract. Before

performance began or any payment was made under the contract, it was cancelled on the ground of misrepresentation and the job was awarded to another bidder. Id. at 557.

Mrs. Schneider was associated with her husband and submitted a bid for approximately $76,500.00 for building alterations to the Defense Department. The bid was also accompanied by the same type of fraudulent payment and performance bond. The Department rejected the bid, being unsatisfied with the bond (although it did not know at first that it was fraudulent), and later accepted a higher bid from another contractor. Id.

The district court found that despite two different bids being submitted by two different Schneiders, they were acting in concert and each was convicted of both frauds. Id. In sentencing, the district

court treated the Schneiders differently based upon a different calculation of loss for each. The district court determined that the loss caused by Mr. Schneider was $82,700.00, the difference between the two new contracts and the Schneider bids. The district court determined that the loss caused by Mrs. Schneider was the sum of the Schneider's two bids, producing a sum in excess of $100,000.00. The district court gave no reason for treating the husband and wife differently. Id.

The United States Court of Appeals for the Seventh Circuit affirmed the convictions, but vacated and remanded for resentencing. The court reasoned that:

> "'Loss' within the meaning of the Guidelines includes intended, probable, or otherwise expected loss, a qualification of vital importance in a case such as this where the fraud is discovered or otherwise interrupted before the victim has been fleeced (citing United

States v. Davis, 922 F.2d 1385, 1391-92 (9th Cir. 1991))." Id. at 558.

The court distinguished the two types of fraud. One case is where the offender never intends to perform, and

> "means to pocket the entire contract price without rendering any service in return. In such a case, the contract price is a reasonable estimate of what we are calling the expected loss ... The other type of fraud is committed in order to obtain a contract that the defendant might otherwise not obtain, but he means to perform the contract (and is able to do so) and to pocket, as the profit from the fraud, only the difference between the contract price and his costs". Id.

The court determined that there was no reason to believe that the Schneiders would not have performed the two contracts to the equal satisfaction of the contracting agencies. The government's suggested method of calculating victim loss was simple but irrational. Id. at

559. The court added that the Schneiders would not go scot-free merely because the government failed to present a loss to the victim of their fraud, simply that the guidelines award bonus punishment points for different levels of proven loss and that the government did not earn a bonus in this case.

Petitioner argues that he, like the Schneiders, did not intend to cause a loss to the government. He was attempting to manage his affairs so that all of his creditors could get paid, including the government. He realizes that his conduct was wrong, and illegal, and is willing to accept his punishment for a violation of the offense charged. He urges, however, that the court of appeals erred in affirming the district courts' analysis in awarding "bonus punishment points" for a loss in excess of $70,000.00 when the

actual loss was zero and the intended loss was zero. Cf. Schneider, supra.

The United States District Court for the Eastern District of California has held that the government has the burden of proving that any loss sustained was probable, and if so, the amount of the loss. United States v. Hughes, 775 F.Supp. 348 (E.D.Cal. 1991). In that case, defendant Hughes conspired with one Mittelman to cause three women to present falsified loan applications to federally insured institutions for the purpose of obtaining loans for the purchase of the homes. There was no desire, intent or expectation by the defendant that any of the loans would go into default. Id. at 349.

The court determined that the only issue in dispute was whether the offense level should be increased an additional 10

levels under 2F1.1(b)(1)(k) based upon a "loss" of $591,610.00, the total amount of the loans.

In declining to increase the offense level, the court specifically distinguished the differences between a theft analysis and a fraud analysis, stating:

> "In a typical case of larceny, embezzlement, or theft, the offender by definition intends to cause the victim to part with his or her property. That is why, as stated in the background notes to §2B.1.1, the value of property taken plays an important role in determining sentences for theft offenses. They are more akin to the first type of case described in Schneider. The present case more closely akin to the second type of case, where property has not been 'taken' in the sense as in a theft case." Id. at 351.

The United States Court of Appeals for the Third Circuit found the logic in Schneider, and Hughes compelling in United States v. Kopp, 951 F.2d 521 (3rd Cir.

1991). The Third Circuit determined that there is a fundamental difference between theft and fraud crimes, and that for purposes of the Federal Sentencing Guidelines, fraud loss is the amount of money lost at the time of sentencing unless defendant intended a greater loss.

In joining the Hughes and Schneider courts, the Kopp court determined that in a theft case, the thief intends to steal whatever he or she takes, the amount taken is the loss the defendant intended to inflict. However, in fraud cases, the loss is calculated as the amount of money the victim has actually ended up losing at the time of sentencing, not what it could have lost. Id. at 530-531.

The United States Court of Appeals for the Tenth Circuit has also analyzed these issues. United States v. Smith, 951 F.2d 1164 (10th Cir. 1991). In that case, Smith represented to a federally insured institution that a buyer had made a $500.00 earnest money payment on a new home, when in fact he had not. Smith was

convicted of aiding and abetting false statements to a federally insured lending institution. The district court sentenced him to serve 24 months because the cumulative value of the loans advanced on the basis of the misrepresentations was $440,896.00, although none were in default at the time of sentencing. Id. at 1166.

Smith appealed to the Tenth Circuit claiming the district court incorrectly calculated the total loss to the government. The Tenth Circuit reversed and determined that the government has the burden of proving the amount of actual loss and that because the government failed to prove any actual loss the defendant's sentence may not be enhanced on the basis of actual loss. Id.

Like the courts in Schneider and Kopp, the Tenth Circuit in Smith distinguished between fraudulent takings and theft:

> "Our approach thus distinguishes between naked fraudulent takings, and exchanges of property where the wrongdoer merely misrepresents the value of the consideration advanced. If a fraud is a naked taking of property, the net and gross loss

> are the same since the victim got nothing of value in return for the property given up. However, if the fraud consists of an unequal exchange of property, the loss or taking consists only of the difference in value between what was given and what was obtained. In any event, it is a net value that must be used to measure loss. Any other approach ignores reality. A thief who steals $100,000.00 is more culpable than a salesman who obtains $100,000.00 by selling a victim an $80,000.00 house he fraudulently represents as being worth $100,000.00. In the latter case, it makes no sense to suggest that $100,000.00 is the accurate measure of the victim's loss." Id. (Citing Schneider, 930 F.2d at 559; and United States v. Whitehead, 912 F.2d 448 (10th Cir. 1990)). Id. at 1167.
>
> Defendant Smith specifically stated that:
>
> "At no time did I intend for a federally insured loan company to lose any money or - or anybody else for that matter." Id. at 1169.

Based upon that comment, the Smith court stated that the case "is more like the one

where 'fraud is committed in order to obtain a contract that the defendant might otherwise not obtain, but he means to perform the contract'." Id. Citing Schneider supra.

The parallel to this case is striking. Petitioner does not deny that he committed the offense. He made serious errors in judgment. His testimony reveals, however, that he was not intending to walk away with thousands of dollars of grain securing government loans without paying for it. He was not intending to steal from the government. Once the court has established the number of points attributable for the commission of the offense itself, the next question is whether the government is entitled to "bonus points", as they were described by the Seventh Circuit in Schneider. Just as in Kopp or Smith, since there has been no

actual loss to the government, Petitioner's intended loss should be analyzed. His testimony is clear that he did not intend for the government to lose any money, but rather was trying to overcome the loss of his grain at the South Shore Elevator and pay his creditors, including the federal government.

Petitioner urges that the court adopt an analysis for determination of loss in this case involving the conversion of mortgaged grain under an analysis like the fraud cases cited. The Federal Sentencing Guidelines give the courts the latitude to consider alternatives. It is urged that the court hold that the calculation of "loss" is the amount of the money that the government actually lost, or the amount of the loss that the defendant intended to inflict if that amount is higher than the

actual loss. Kopp, supra, at 536. In this case, since there was no actual loss to the United States government because Petitioner repaid the loans prior to sentencing, and since Petitioner was not intending to inflict a loss on the government by his actions, Petitioner urges that this court remand to the district court for instructions to resentence the Defendant based upon a loss calculation of zero, resulting in offense level two. Alternatively, Petitioner urges this Court to adopt the analysis described above, and remand to the district court for specific findings with respect to his intent.[1] The facts of the offense in these cases more closely

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[1]28 U.S.C. 2106 authorizes this court to affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review.

correspond to the analysis discussed above, rather than a straight theft application of the sentencing guidelines.

If this Court rejects Petitioner's arguments above, he urges that the Court review and determine that the district court erroneously failed to give him credit for the $55,000.00 in payments made to the ASCS office, all within 20 days of the inspection by government officials. Those payments were made more than a year before the indictment. It is only reasonable that he receive credit for those payments so promptly made. Moreover, the money paid to the ASCS office during the month of April, 1990, completely repaid the two loans that were represented by indictment Counts I and III. Counts I and III were dismissed by the prosecution. Obviously, Petitioner did not enter a plea of guilty, nor was he

convicted, of those counts. The guidelines require the court to consider all relevant conduct. Should the court reject Petitioner's arguments above, Petitioner urges the court to remand with instructions to the district court to grant credit for such payments, reducing the loss.

II. THE COURT OF APPEALS DECISION HOLDING THAT THE DEFENDANT WAIVED HIS ARGUMENT BECAUSE HIS OBJECTION WAS NOT SUFFICIENTLY SPECIFIC WAS IN ERROR.

The Court of Appeals held that Petitioner must specifically object to the method of loss calculation utilized at sentencing in order to preserve the issue for appeal. Although the Court of Appeals noted that Petitioner "contested the inclusion of loss from the dismissed counts at sentencing on largely the same grounds that he raises on appeal," the court concluded that his failure to specifically bring to the attention of the district court an alternative sentencing scheme restricted its review of the claim.

Petitioner contends that his objections to the presentence report, coupled with the testimony presented at sentencing, raised the issue of how the loss should be calculated. Petitioner is

not under a duty to specifically raise an argument to preserve the issue for appeal.

Other courts have granted latitude to permit consideration of such issues. The court in U.S. v. Cockerham, 919 F.2d 286 (5th Cir. 1990) stated:

> "After thoroughly reviewing the record, we determined that Cockerham did, impliedly at least, object to the inclusion as relevant conduct of those losses occasioned by acts for which he was not indicted." (Emphasis added).

Clearly, Petitioner objected to the amount of loss at sentencing and in his objections to presentence report. Petitioner "brought alleged factual inaccuracies clearly to the attention of the judge during the sentencing hearing." See U.S. v. Frye, 831 F.2d 664 (6th Cir. 1987). It is correct that this argument was not made to the sentencing court, but

the objections were made, and the facts presented which support the argument.

Petitioner asks the court to appreciate the practical dilemma that he faced in this case. The dilemma arises because the sentencing court has the discretion to add or subtract two sentencing points for the defendant's acceptance of responsibility. U.S.S.G. §3E1.1. In a case such as this, the applicable guideline range without the additional two points may be satisfied by a sentence that includes probation, intermittent confinement, community confinement, etc. U.S.S.G. §5C1.1. The additional two points also represent a four month increase in the guideline ranges.

The two point credit for acceptance of responsibility is not automatic, even though Petitioner pled guilty. U.S.S.G.

§3E1.1(c). Petitioner is thus placed in a difficult position of either admitting that he committed the offense and openly being willing to accept responsibility for his actions, or strenuously objecting to the sentence and procedures and presentence report, declaring that he did not intend to cause any loss or harm to anyone, and that he should not be punished as harshly as if he had intended to cause a loss. The obvious risk is, however, that the latter approach may cause the sentencing judge to conclude that the defendant is not sincere in his acknowledgment that the offense was committed, and should not have been committed, and add two points for failing to accept responsibility for his actions.

Petitioner alerted the sentencing court to his objections to the amount of

loss described in the presentence report and did preserve the issue for appeal.

CONCLUSION

For the foregoing reasons, the petition of certiorari should be granted.

Respectfully submitted this 25th day of May, 1993.

AUSTIN, HINDERAKER, HOPPER & STRAIT

BY: Arthur M. Hopper

Arthur M. Hopper
Attorneys for Petitioner
25 First Avenue, S.W., P.O. Box 966
Watertown, South Dakota 57201-0966

APPENDICES

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-2379SDRC		FILED March 9, 1993
United States of America,	*	William F. Clayton, Clerk
	*	
Appellee,	*	Appeal from
vs.	*	the United States
	*	District Court for
Wallace L. Redlin,	*	the District of
	*	South Dakota
Appellant.	*	

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

January 14, 1993

A true copy.

Attest: Michael E. Gens

Clerk, U.S. COURT OF APPEALS,

EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 92-2379

United States of America,	*	
	*	Appeal from the
Appellee,	*	United States
	*	District Court for
Wallace L. Redlin,	*	the District of South
	*	Dakota.
Appellant.	*	

Submitted: November 11, 1992

Filed: January 14, 1993

Before JOHN R. GIBSON and MAGILL, Circuit Judges, and VAN SICKLE*, Senior District Judge.

MAGILL, Circuit Judge.

Wallace L. Redlin appeals from the

sentence imposed by the district court[1] following his guilty plea to two counts of conversion of mortgaged property in violation of 15 U.S.C. § 714m(c). Because we find that Redlin failed to raise the objection urged on appeal at the sentencing hearing, we affirm.

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*THE HONORABLE BRUCE M. VAN SICKLE, Senior United States District Judge for the District of North Dakota, sitting by designation.

[1]The Honorable Richard H. Battey, United States District Judge for the District of South Dakota.

I.

On March 30, 1989, an investigation of Redlin's farm revealed that grain he had pledged as collateral for federal farm loans was missing. A federal grand jury indicted Redlin on four counts of conversion of government property. In short, the government alleged that Redlin had sold the grain and applied the proceeds to pay off loans other than those for which the grain was specifically pledged. Pursuant to a plea agreement, Redlin pled guilty to counts II and IV, while counts I and III were dismissed.

At sentencing, the only controverted issue was the determination of the amount of loss caused by Redlin's conduct. The presentence report applied the rubric for calculation of loss attributable to the defendant's conduct found in U.S.S.G. § 2B1.1, and calculated the loss at $93,739,

representing the entire value of the grain missing on the date of inspection. This loss amount constituted an eight-point enhancement to Redlin's offense level. Redlin submitted objections to that amount, contending instead that the proper loss attributable to his conduct was $49,157.93, the amount attributable to the counts to which he pled guilty. He argued that the loss attributable to the dismissed counts should not be included because he did not intend to convert the grain, did not plead guilty to the charges, and paid back the loans within twenty days of the inspection that revealed the conversion.

At the sentencing hearing, Redlin renewed these objections. He contended that the court should exclude the loss attributable to the dismissed counts, and enhance his sentence by seven points

rather than eight. The district court conducted an evidentiary hearing, at which Redlin testified that he intended to pay off all the loans and did not intend to defraud the government. The district court asked Redlin several questions, stating that it was attempting to determine whether the uncharged counts constituted "related conduct" under the guidelines. Under questioning by the government and the court, Redlin admitted that he had disposed of all of the grain in question without authority.

The court then concluded that the loss under the uncharged counts constituted relevant conduct, the presentence report correctly calculated the loss, and the eight-level enhancement applied. This resulted in an offense level of ten, with a guideline sentencing range of six to twelve months. The

district judge sentenced Redlin to six months, and he appeals.

II.

Redlin contends that the district court erred by attributing any loss at all to his conduct. In a novel argument, he suggests that his conduct was more akin to a fraud in which no loss was intended. He thus contends that the district court should have applied the analysis for calculation of loss found in the application notes to the fraud guideline, U.S.S.G. § 2F1.1, in which the loss is calculated as the higher of the intended loss or actual loss. Redlin claims that because he intended to pay the government back, he intended no loss. Moreover, because he had in fact paid the government back by the date of sentencing, Redlin claims that the government suffered no actual loss.

The government contends that Redlin's failure to suggest this alternative loss calculation scheme at sentencing constitutes waiver. Redlin argues that because he objected to the calculation of loss based upon his intent and his repayment of the converted grain, he preserved the issue for appeal. We believe that on this record, Redlin's failure specifically to bring to the attention of the district court the alternative sentencing scheme found in § 2F1.1 restricts our review of that claim.

We will allow sentences to be attacked on grounds raised for the first time on appeal in only the most exceptional cases. A party must raise a claim of error with the district court so the district court may correct itself and thus obviate the need for our review. "[I]t is simply unfair to reverse a trial

court on the basis of an issue that it has not had the opportunity to consider." United States v. Thornberg, 844 F.2d 573, 575 (8th Cir.), cert. denied, 487 U.S. 1240 (1988). This court will not reverse a district court on an issue that is raised for the first time on appeal unless a gross miscarriage of justice would otherwise result. United States v. Filker, 972 F.2d 240, 242 (8th Cir. 1992); United States v. Houston, 892 F.2d 696, 707 (8th Cir. 1989).

Redlin contested the inclusion of loss from the dismissed counts on largely the same grounds that he raises on appeal: that he intended no loss and he repaid all the converted amounts. Redlin contends that this objection in effect alerted the district court to the argument he now raises, and thus preserved that argument for appeal.

We disagree. On the specific facts of this case, we believe that Redlin's failure to specify the alternative basis for calculation of loss constitutes waiver. At sentencing, Redlin did not object to the inclusion of the loss attributable to the charged counts; he therefore waived any objection to their inclusion. With respect to the dismissed counts, Redlin stated merely that his loss calculation should be reduced because he never intended a loss and he paid the money back. These objections failed to alert the district judge to the error Redlin now asserts; Redlin never gave the district court a basis at the sentencing hearing to believe that his specific objections were legally relevant. The presentence report calculated the loss pursuant to U.S.S.G. §2B1.1, the guideline section listed as applicable to Redlin's

conduct. Under the loss calculation provided in this guideline, whether the defendant intended loss or whether he paid back the money is irrelevant. See U.S.S.G. § 2B1.1, comment. (n.2). Moreover, Redlin phrased his objection as a plea for leniency rather than a specific legal objection. He stated: "Your honor, [we have no objections] other than the second portion of our objection which is not actually an objection, but simply takes note of the fact that Mr. Redlin has, in fact, paid his entire debt to the ASCS and the federal government. That payment was made after the presentence report was prepared, and so we offer that additional information."

Thus, the presentence report applied what on its face is the correct guideline, Redlin's specific objections were irrelevant under that guideline, and

Redlin suggested no alternative framework under which his objections were relevant. The district court had no basis to determine, based upon Redlin's objection, that another method of calculating the loss was more appropriate. Because Redlin failed to bring his argument concerning the applicability of another portion of the guidelines to the attention of the district court, we review the district court's decision not to consider Redlin's intent and repayment only to determine whether it constituted a gross miscarriage of justice.

We are convinced that the district court's decision to accept the loss calculation set forth in the presentence report was not a gross miscarriage of justice. First, the presentence report calculated the loss under the guideline specifically applicable to Redlin's

conduct. Second, as Redlin admits, no other court has accepted the argument that U.S.S.G. § 2F1.1 should apply to violations of 15 U.S.C. § 714m(c). Finally, Redlin's main argument is that he never intended any loss and that he repaid all the outstanding debts. However, these actions occurred only after the inspection which discovered the conversion. Therefore, we conclude that the district court's refusal to exclude the loss from the dismissed counts based upon an argument that Redlin did not intend to cause a loss and repaid the money was not a gross miscarriage of justice.

That conclusion does not end our review. We still must determine whether the district court correctly calculated the loss in light of the objections to the presentence report. As we noted above, the court correctly accepted § 2B1.1 as

the proper standard for calculation of the loss. Redlin's objection to the inclusion of the loss from the dismissed counts, however, obligated the district court to make a specific finding with respect to those amounts. See Fed. R. Crim. P. 32(c)(3)(D); United States v. Streeter, 907 F.2d 781, 792 (8th Cir. 1990). The district court in fact made such a finding, determining that Redlin had disposed of the grain in the uncharged counts without authority, and that the loss constituted relevant conduct under U.S.S.G. § 1B1.3.

The Sentencing Guidelines provide that conduct which is relevant to determining the appropriate guideline sentencing range includes "all such acts and omissions that were part of the same course of conduct or a common scheme or plan as the offense of conviction."

U.S.S.G. § 1B1.3(a)(2). A district court's determination whether actions were part of the same course of conduct as the counts of conviction is a question of fact reviewable only for clear error. United States v. Gooden, 892 F.2d 725 (8th Cir. 1989); United States v. Ehret, 885 F.2d 441, 444 (8th Cir. 1989). Under questioning by the government and the court, Redlin admitted that he had disposed of without authority all the grain for which he was initially charged. Furthermore, Redlin admitted that these actions were part of a continuing course of conduct he undertook to cover up for missing grain. Based upon this evidence, the court concluded that the amounts from the dismissed charges were properly included in the loss calculation as related conduct under U.S.S.G. § 1B1.3.

We cannot conclude that this decision constituted clear error.

III.

For all the foregoing reasons, we affirm.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DIVISION DISTRICT OF SOUTH DAKOTA

UNITED STATES OF AMERICA JUDGMENT IN A

V. CRIMINAL CASE

WALLACE L. REDLIN (For Offenses Committed On or After November 1, 1987)

(Name of Defendant) Monte Hopper

Defendant's Attorney

THE DEFENDANT:

X pleaded guilt to count(s) II and IV of the Indictment

___ was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense
15:714m(c)	Conversion of Mortgaged Property

Date Offense Concluded	Count Number(s)
03/30/90	II

Title & Section	Nature of Offense
15:714m(c)	Conversion of Mortgaged Property

Date Offense Concluded	Count Number(s)
03/30/90	IV

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

___ The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

___ Count(s) _____ (is)(are)

dismissed on the motion of the United States.

X It is ordered that the defendant shall pay a special assessment of $100.00, for count(s) II and IV of the Indictment, which shall be due immediately:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 503-58-5133

Defendant's Date of Birth: 06-18-48

Defendant's Mailing Address:

1143 4th Street N.W.

Watertown, SD 57201

Defendant's Residence Address:

1143 4th Street N.W.

Watertown, SD 57201

May 4, 1992

Date of Imposition of Sentence

/s/

Richard H. Battey

Signature of Judicial Officer

RICHARD H. BATTEY

UNITED STATES DISTRICT JUDGE

Name and Title of Judicial Officer

May 4, 1992

Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of six (6) months.

___ The court makes the following recommendations to the Bureau of Prisons:

__ The defendant is remanded to the custody of the United States marshal.

__ The defendant shall surrender to the United States marshal for this district.

__ at __ a.m/p.m. on _____

__ as notified by the United States marshal.

_X_ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

_X_ before 2 p.m. on 06/01/92.

__ as notified by the United States marshal.

__ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on ___ to _____ at _____, with a certified copy of this judgment.

_____

United States Marshal

By _____

Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of two (2) years.

While on supervised release, the defendant shall not commit another federal, state or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

___ The defendant shall report in person to the probation office in the

district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

The defendant shall not possess a firearm or destructive device.

1. The defendant shall not commit another federal, state or local offense;
2. The defendant shall abide by the standard conditions of probation recommended by the Sentencing Commission;
3. The defendant shall provide the probation officer access to any requested financial information.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family

responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used,

distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law

enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINE

The defendant shall pay a fine of $2,000.00. The fine includes any costs of incarceration and/or supervision.

__ This amount is the total of the fines imposed on individual counts, as follows:

__ The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

__ The interest requirement is waived.

__ The interest requirement is modified as follows:

This fine plus any interest required shall be paid: as directed by the Probation Office

__ in full immediately.

__ in full not later than _____.

___ in equal monthly installments over a period of ___ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.

___ in installments according to the following schedule of payments:

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 10

Criminal History Category: I

Imprisonment Range: 6 to 12 months

Supervised Release Range: 2 to 3 years

Fine Range: $2,000 to $20,000

__ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $_____

___ Full restitution is not ordered for the following reason(s):

_X_ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

___ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

___ upon motion of the government, as a result of defendant's substantial assistance.

___ for the following reason(s):

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 92-2379SDRC

United States of America,	*	
	*	
Plaintiff-Appellant,	*	Appeal from
	*	the United
vs.	*	States
	*	District Court
Wallace L. Redlin,	*	for the
	*	District of
Defendant-Appellant.	*	South Dakota

The petition for rehearing by the panel is denied.

February 10, 1993

Order Entered at the Direction of the Court:

/s/ Michael E. Gens

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D
UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 92-2379SDRC

United States of America,	*	
	*	
Plaintiff-Appellant,	*	Appeal from
	*	the United
vs.	*	States
	*	District Court
Wallace L. Redlin,	*	for the
	*	District of
Defendant-Appellant.	*	South Dakota

Appellant's motion for stay of mandate has been considered by the court and is hereby denied.

February 24, 1993

Order Entered at the Direction of the Court:

/s/ Michael E. Gens

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX E
SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

William K. Suter
Clerk of the Court

Area Code 202
479-3011

Mr. Douglas Austin
25 First Avenue, S.W.
P.O. Box 966
Watertown, SD 57201-0966

RE: Wallace L. Redlin,
v. United States
Application No. A-669

Dear Mr. Austin:

The application for stay of mandate in the above-entitled case has been presented to Justice Blackmun who on March 8, 1993, endorsed thereon the following:

"Application is Denied
Harry A. Blackmun
Associate Justice
8 March 1993"

Very truly yours,

WILLIAM K. SUTER, Clerk

BY: /s/ Cynthia Rapp

Cynthia Rapp
Assistant Clerk

NOTE - FOR YOUR INFORMATION: A copy of this letter has been sent to all interested parties shown on the

attached notification list.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

William K. Suter
Clerk of the Court

Area Code 202
479-3011

NOTIFICATION LIST

Mr. Douglas Austin
25 First Avenue, S.W.
P. O. Box 966
Watertown, SD 57201-0966

Mr. William C. Bryson
Acting Solicitor General
U.S. Department of Justice
Washington, DC 20530

Ms. Michelle Tapken
135 Federal Bldg & Courthouse
400 S. Phillips Ave., PO 1073
Sioux Falls, SD 57101

APPENDIX F

15 U.S.C. §714m(c)

"Whoever shall willfully...dispose of, or convert to his own use...any property... mortgaged or pledged to, the corporation...shall, upon conviction thereof, if such property be of an amount or value in excess of $500.00, be punished by a fine of not more than $10,000.00 or by imprisonment for not more than five years, or both."

18 U.S.C. § 3742

(a) Appeal by a defendant - A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence-

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

28 U.S.C. §1254(1)

Cases in the courts of appeals may be

reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. §2106

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

U.S.S.G. §1B1.3

Unless otherwise specified, (i) the base offense level where the guideline

specifies more than one base offense level... shall be determined on the basis of the following:

(1) all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense.

U.S.S.G. §2B1.1

(b) Specific Offense Characteristics

(1) If the loss exceeded $100, increase the offense level as follows:

Loss (Apply the Greatest)	Increase in Level
(I) More than $70,000	add 8

U.S.S.G. §3E1.1

(a) If the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct, reduce the offense level by 2 levels.

U.S.S.G. §3E1.1(c)

(c) A defendant who enters a guilty plea is not entitled to a sentencing reduction under this section as a matter of right.

U.S.S.G. §5C1.1

(c) If the minimum term of imprisonment in the applicable guideline range in the Sentencing Table is at least one but not more than six months, the minimum term may be satisfied by (1) a sentence of imprisonment; (2) a

sentence of probation that includes a condition or combination of conditions that substitute intermittent confinement, community confinement, or home detention for imprisonment according to the schedule in §5C1.1(e); or (3) a sentence imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in §5C1.1(e), provided that at least one-half of the minimum term, but in no event less than one month, is satisfied by imprisonment.